

N.D.A.G. Letter to McClure (July 22, 1985)

July 22, 1985

Mr. Brian C. McClure, Director
Central Personnel Division
State Capitol
Bismarck, North Dakota 58505

RE: Marty F. Johnson

Dear Mr. McClure:

Thank you for your letter of May 30, 1985.

On behalf of the North Dakota State Personnel Board, you have directed questions to me concerning the status of North Dakota Air National Guard Employees engaged in fire protection security services at Hector Field in Fargo, North Dakota, under the Central Personnel System rules, regulations, and policies and N.D.C.C. § 54-44.3-20.

I have had an opportunity to examine the various materials attached to your letter. It appears that Mr. Johnson was a member of the North Dakota Air National Guard while employed as an assistant fire chief and firefighter at Hector Field. In addition, as shown by the letter prepared by Robert Burns dated August 6, 1981, Mr. Johnson's position was "other unclassified" in the state service.

Absent contradictory evidence, it is presumed that official duty has been regularly performed. N.D.C.C. § 31-11-03(15). According to the letter of Mr. Burns dated August 6, 1981, the assistant fire chief and firefighter positions for the North Dakota National Guard were shown to be authorized for that state department in the records of the Central Personnel Division and that such positions were "other unclassified." This statutory presumption of regularity should be applied in this matter. Mr. Johnson had the opportunity, pursuant to N.D.C.C. § 54-44.3-07 and the rules, regulations, and policies of the Central Personnel System validly promulgated and published in the North Dakota Administrative Code, for review of his state service status as "unclassified." He has not taken advantage of these review procedures despite the apparent lengthy time he has been placed under the "unclassified" status.

Absent evidence to the contrary, it must be presumed that the position held by Mr. Johnson as an assistant fire chief and firefighter in the North Dakota Air National Guard was unclassified state service.

This response is limited solely to an inquiry concerning the state service status of the position held by Mr. Johnson only. This response should not be construed to extend to

other members of the North Dakota National Guard since their positions and status under the Central Personnel System may involve different factual or legal issues.

As you are aware, I am in the position of being an advisor for both the North Dakota State Personnel Board and the Governor and Adjutant General. N.D.C.C. § 54-44.3-10 requires that the Attorney General be responsible for "representing the personnel system in all legal contexts." N.D.C.C. §37-02-05 requires that the Attorney General of the state be the legal advisor to the Governor and the Adjutant General. It is likely that I, or members of my staff, may be required to provide our legal advice should this matter pertaining to Mr. Johnson be brought before the Personnel Board. Therefore, it is necessary, as stated previously, to limit this response to the Personnel Board to the specific facts submitted to me pertaining to the position held by Mr. Johnson.

I can provide no opinion or conclusions as to specific factual matters of the Johnson matter which may be heard and resolved by the Board or in a court of law or anticipate other possible legal and factual issues which may be raised by either Mr. Johnson or the North Dakota Air National Guard.

However, I do think it important to point out to the Board the provisions of N.D.C.C. § 37-01-23. Although not raised by any of the participants to the Johnson matter before the Board, this statutory provision may be in potential conflict with validly promulgated and published rules, regulations, or policies of the Central Personnel System and the North Dakota Personnel Board. N.D.C.C. § 37-01-23, states as follows:

37-01-23. CUSTOM AND USAGE OF THE ARMED FORCES OF THE UNITED STATES TO GOVERN NATIONAL GUARD. All matters relating to the organization, discipline, and government of the national guard, not otherwise provided for in this title or in the general regulations, shall be decided by the custom and usage of the armed forces of the United States.

Mr. Johnson appears to possess a dual status as a North Dakota state employee and a member of the North Dakota Air National Guard. Mr. Johnson is not a civilian employee but is a member of the state military service. Application of this statutory provision may create a conflict between validly promulgated rules, regulations, and policies of the Central Personnel System and the general power of the North Dakota National Guard to govern the members in its service. This statutory provision may affect the manner in which the Personnel Board classifies positions which are held by members of the North Dakota National Guard, especially when such positions are held as a result of assignment or orders by the Adjutant General or his staff.

It is my understanding that the State of Ohio has specifically excluded commissioned and non-commissioned officers in the Ohio National Guard from that state's classified service. The State Personnel Board may desire to consider this issue independent of any proceedings involving Mr. Johnson.

Very truly yours,

Nicholas J. Spaeth

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cc: Jerald Engelman
John Schneider